Chiovaro v Wilcox
2019 NY Slip Op 33113(U)
October 17, 2019
Supreme Court, Suffolk County
Docket Number: 16-3774
Judge: Denise F. Molia

SHORT FORM ORDER

INDEX No. 16-3774
CAL. No. 18-01382MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-18-18
ADJ. DATE 3-1-19
Mot. Seq. # 002 - MD

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CAROLYN CHIOVARO and DANIELLE IUCULANO,

Plaintiffs,

- against -

JONATHAN D. WILCOX and CHRISTOPHER J. WILCOX,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17-31 ; Replying Affidavits and supporting papers 32-36 ; Other Sur-Reply - 37-41 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Jonathan Wilcox and Christopher Wilcox seeking summary judgment dismissing the complaint is denied.

Plaintiffs Carolyn Chiovaro and Danielle Casseus, s/h/a Danielle Iuculano, commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Goose Hill Road and Main Street in the Town of Huntington on September 24, 2015. By their complaint, plaintiffs allege that the vehicle that they were riding in as passengers and operated by nonparty Scott Chiovaro was struck in the rear by the vehicle owned by defendant Jonathan Wilcox and operated by defendant Christopher Wilcox while it was stopped At the time of the accident, plaintiff Chiovaro was riding as a front seat passenger and plaintiff Casseus was riding as a backseat passenger in the Chiovaro vehicle. By their bill of particulars, plaintiff Chivoaro alleges that she

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sustained various personal injuries due to the subject collision, including multilevel disc bulges and herniations of the cervical and lumbar spines, and supraspinatus tendinosis of the left shoulder. In addition, plaintiff Casseus alleges in the bill of particulars that she sustained the numerous personal injuries as a result of the subject accident, including disc bulges at levels C5 through C7.

Defendants now move for summary judgment on the basis that the injuries plaintiffs allege to have sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiffs' deposition transcripts, uncertified copies of plaintiffs' medical records concerning the injuries at issue, and the sworn medical reports of Dr. Jimmy Lim, Dr. Jean-Robert Desrouleaux, and Dr. David Fisher. At defendants' request, Dr. Lim conducted an independent orthopedic examinations of plaintiff Chiovaro and plaintiff Casseus on February 13, 2018. Also at defendants' request, Dr. Desrouleaux conducted an independent neurological examinations of plaintiff Chiovaro and plaintiff Casseus on February 5, 2018. Plaintiffs oppose the motion on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that they sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject collision. In opposition to the motion, plaintiffs submit their own affidavits, the affidavits of Dr. Christopher Haas, and the sworn medical reports of Dr. Steven Winter, Dr. Dina Nelson, and Dr. Samuel Thampi.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692

[2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendants, by submitting competent medical evidence and plaintiff Chiovaro's deposition transcript, have established a prima facie case that plaintiff Chiovaro did not sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law as a result of the subject (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Bienaime v All Seasons Taxi Corp.***, __ AD3d __, 105 NYS3d 919 [2d Dept 2019]; ***Zavala v Zizzo***, 172 AD3d 793, 99 NYS3d 354 [2d Dept 2019]; ***Cavitolo v Broser***, 162 AD3d 913, 81 NYS3d 188 [2d Dept 2018]; ***Brun v Farningham***, 149 AD3d 686, 51 NY3d 172 [2d Dept 2017]). Defendants examining orthopedist, Dr. Lim, states in his medical report that an examination of plaintiff Chiovaro reveals she has full range of motion in her spine, shoulders, wrists, hands, and knees; that the straight leg raising test is negative; and that her muscle strength and reflexes are normal. Dr. Lim further states that no muscle spasm or tenderness is observed upon palpation of plaintiff Chiovaro's paravertebal spinal muscles; that there is no evidence of erythema, tenderness or swelling in her knees, wrists, hands, or shoulders; that the Tinsel, Phalen, and Finkestien tests are normal; that there is no thenar or hypothenar eminence atrophy in her wrist; and that she walks with a normal gait. Dr. Lim opines that the muscle strains sustained by plaintiff Chiovaro as a result of the subject accident have resolved. Dr. Lim concludes that his examination of plaintiff Chiovaro did not reveal any evidence of an orthopedic disability causally related to the subject accident, that she is capable of performing her normal activities of daily living without restrictions, and that her prognosis is good.

Similarly, defendants' examining neurologist, Dr. Desrouleaux, states in his medical report that an examination of plaintiff Chiovaro reveals that she has full range of motion in her spine, that her muscle strength is 5/5, that there was no evidence of dysmetria, and that there was no evidence of muscle spasm or tenderness upon palpation of the paraspinal muscles. Dr. Desrouleaux states that plaintiff Chiovaro does not have a limp or antalgic gait, that the straight leg raising test is negative, that there was no evidence of atrophy of the intrinsic muscles, and that the lower cranial nerve function is normal. Dr. Desrouleaux opines that the myofasciitis plaintiff Chiovaro sustained to her spine, as well as the posttraumatic headaches, have resolved. Dr. Desrouleaux further states that plaintiff Chiovaro is capable of performing her normal activities of daily living and maintaining full employment without restrictions.

Furthermore, plaintiff Chiovaro's deposition testimony establishes that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff Chiovaro testified at an examination before trial that she missed approximately two weeks from her employment as an administrative

bookkeeper following the subject accident, that she continued to perform the telephone collections part of her job while she was home during the two weeks after the accident, that she began receiving physical therapy in spring 2016, but that she ceased treatment in December 2016, and that she does not have any current or future medical appointments scheduled for any injuries related to the subject accident.

However, defendants have failed to demonstrate, prima facie, that plaintiff Casseus' alleged injuries do not meet the serious injury threshold requirement of Insurance Law § 5102 [d] (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]). Despite defendants' examining orthopedist, Dr. Lim, concluding in his medical report that plaintiff has full range of motion in her spine, that the muscle strains sustained by plaintiff Casseus as a result of the subject accident have resolved, defendants' examining neurologist, Dr. Desrouleaux, states in his medical report that although plaintiff Casseus has muscle strength of 5/5 in her upper and lower extremities, she has a positive Tinsel sign in her left wrist, and that the left carpal tunnel syndrome she sustained as a result of the subject accident has not resolved. Dr. Desrouleaux also states that, even though plaintiff Casseus is capable of performing her tasks activities of daily living and working, she remains restricted in the amount of weight that she can lift. Having determined that defendants failed to establish their initial burden, it is unnecessary for the court to consider whether plaintiff Casseus' opposition papers were sufficient to raise a triable issue of fact (*see* ***Bright v Moussa***, 72 AD3d 859, 898 NYS2d 865 [2d Dept 2010]; ***Alma v Samedy***, 24 AD3d 398, 805 NYS2d 417 [2d Dept 2005]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2d Dept 2005]).

Defendants, having made a prima facie showing that plaintiff Chiovaro did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous

range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to defendants' prima facie showing, plaintiff Chiovaro has raised a triable issue of fact as to whether she sustained a serious injury within the meaning of the Section 5102 (d) of the Insurance Law (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp.,*** inc., 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff Chiovaro has submitted the affidavit of Dr. Christopher Haas, her treating chiropractor. Dr. Hass, in his affidavit, concludes, based upon his contemporaneous and recent examinations of plaintiff Chiovaro, that the injuries to her spine are permanent, and that the observed range of motion deficits were significant (*see* ***Vaughan-Ware v Darcy***, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Haas further states that the injuries to the plaintiff Chiovaro's spine and the range of motion limitations are causally related to the subject accident (*see* ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Consequently, Dr. Haas' affidavit is sufficient to raise a triable issue of fact as to whether plaintiff Chiovaro sustained a serious injury to her spine within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: 10-17-19

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**